91-1790

No. _____

Supreme Court, U.S.
FILED
MAY 4 1992
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

WELDON PARKHILL, HENRY B. PARKHILL, DAVID C. COWDEN, JOHN B. RUNGE, Individually and d/b/a PARKHILL, PARKHILL, COWDEN & RUNGE, A General Partnership, JOHN VAUGHAN, PARKHILL, PARKHILL, COWDEN & RUNGE, A Professional Corporation and PARKHILL & PARKHILL, A General Partnership, *Petitioners*

vs.

EDWIN I. ADUDDELL, *Respondent*

Petition for Writ of Certiorari to the Texas Supreme Court

CHARLES W. McGARRY
Counsel of Record
LAW OFFICE OF CHARLES McGARRY
714 Jackson Street
Suite 200
Dallas, Texas 75202
(214) 748-0800
Counsel for Petitioners

Fort Worth Brief Printing Co., 610 South Jennings Avenue, Fort Worth, Texas 76104 - Phone 817-332-4070

24

QUESTIONS PRESENTED FOR REVIEW

Does the retroactive application of a state supreme court decision violate the Due Process Clause of the Fourteenth Amendment, when the decision vitiates a previously vested statute of limitations defense, and revives a defendant's liability for punitive damages?

Is the Due Process Clause of the Fourteenth Amendment violated when a defendant is retroactively subjected to liability for punitive damages?

TABLE OF CONTENTS

Page

Questions Presented for Review i

Table of Contents ii

Table of Authorities iii

Opinions Below 1

Jurisdiction 2

Constitutional Provisions Involved 2

Statement of the Case 2

Reasons for Granting the Writ 4

Conclusion 7

Certificate of Service 8

Appendices:

Appendix A: *Aududdel v. Parkhill, et al.*, 35 Tex. S. Ct. J. 156 (November 23, 1991) A-1

Appendix B: *Hughes v. Mahaney*, 35 Tex. S. Ct. J. 157 (November 23, 1991) A-3

Appendix C: Order of Texas Supreme Court denying Petitioners' Motion for Rehearing (February 5, 1992) A-10

TABLE OF AUTHORITIES

Cases: Page

Bouie v. City of Columbia, 378 U.S. 347 (1984) 5

Calder v. Bull, 3 Dall. 386 (1798) 5

Cavnar v. Quality Control Parking Co., 696 S.W.2d 549 (Tex. 1985) 6

Cummings v. Missouri, 4 Wall. 277 (1867) 5

DeVeau v. Braisted, 363 U.S. 144 (1960) 5

Hughes v. Mahaney, 35 Tex. S. Ct. J. 157 (November 23, 1991) 2, 5

McClung v. Johnson, 620 S.W.2d 644 (Tex. App.-Dallas 1987, writ ref'd, n.r.e.) 4

Pacific Mutual Life Ins. Co. v. Haslip, ——— U.S. ———, 111 S. Ct. 1032 (1991) 5

Ratner v. Sioux Natural Gas Corp., 719 F.2d 801 (5th Cir. 1983) 6

Smith v. Cahoon, 283 U.S. 553 (1930) 5

United States v. Peltier, 422 U.S. 531 (1975) 5

United States Trust Co. v. New Jersey, 431 U.S. 1 (1977) 4

Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1975) 5

Wilson v. Work, 122 Tex. 545, 62 S.W.2d 490 (1933) 4

Constitutional Provisions and Statutes:

U.S. CONST. amend. XIV 2

28 U.S.C. §1257(3) 2

28 U.S.C. §2101(c) 2

Rules:

Sup. Ct. R. 20.4 2

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

WELDON PARKHILL, HENRY B. PARKHILL, DAVID C. COWDEN, JOHN B. RUNGE, Individually and d/b/a PARKHILL, PARKHILL, COWDEN & RUNGE, A General Partnership, JOHN VAUGHAN, PARKHILL, PARKHILL, COWDEN & RUNGE, A Professional Corporation and PARKHILL & PARKHILL, A General Partnership, *Petitioners*

vs.

EDWIN I. ADUDDELL, *Respondent*

Petition for Writ of Certiorari to the Texas Supreme Court

OPINIONS BELOW

This petition seeks review of the judgment and opinion of the Texas Supreme Court, which reversed the judgment of both the Court of Appeals for the Fifth Court of Appeals District of Texas at Dallas and the trial court. The trial court had entered summary judgment for the Petitioners on a defense of limitations, and the court of appeals had affirmed the judgment in an unpublished opinion.

The Texas Supreme Court reversed and remanded the case, holding that limitations had been tolled as a matter of law. (See Appendix A). The basis for the court's holding was a new

rule of law announced the same day in an unrelated case, *Hughes v. Mahaney*, 35 Tex S. Ct. J. 157 (November 23, 1991). (See Appendix B). Petitioners' Motions for Rehearing were denied on February 5, 1992. (See Appendix C).

JURISDICTION

The jurisdiction of this Court is invoked on the basis of 28 U.S.C. §1257(3) because rights arising under the Constitution of the United States are claimed.

The opinion and judgment of the Texas Supreme Court were issued on November 20, 1992. Petitioners' Motions for Rehearing were denied by order of the Texas Supreme Court dated February 5, 1992. This petition is filed within 90 days of that date as required by 28 U.S.C. §2101(c). Sup. Ct. R. 20.4.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment provides, in pertinent part:

> Section 1 . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction equal protection of the laws.

STATEMENT OF THE CASE

This is a legal malpractice suit in which the plaintiff alleged that his attorneys were negligent in failing to file an underlying asbestosis suit before the applicable limitations period had expired.

Edwin Aduddell was screened for asbestosis on April 24, 1983. A suit was filed on his behalf in U.S. District Court on

May 20, 1985. The district court in that case subsequently entered judgment against Aduddell, holding that the applicable two-year limitations period had expired on April 24, 1985. The district court's judgment was affirmed by the court of appeals on August 17, 1987, and this court denied his Petition for Writ of Certiorari on February 22, 1988.

Aduddell filed this malpractice action in state court on June 22, 1988, seeking both actual and punitive damages. The trial court in this case held that Aduddell had waived reliance on the "discovery rule" and that his cause of action for malpractice had therefore accrued on April 24, 1985, when limitations barred his asbestosis claim. Consequently, the trial court entered judgment against Aduddell in the malpractice suit on a defense of limitations. This judgment was affirmed by the court of appeals on October 23, 1990.

Over a year later, on November 20, 1991, the Texas Supreme Court held in an unrelated case, *Hughes v. Mahaney*, 35 Tex. S. Ct. J. 157 (November 23, 1991) that the limitations period for a legal malpractice action is tolled until all appeals on the underlying claim are exhausted. (See Appendix B). On the same day, the Texas Supreme Court reversed this case, citing the "new rule tolling limitations" announced in *Hughes*. (See Appendix A).

A Motion for Rehearing was filed in the Texas Supreme Court, alleging that the application of the new rule to the instant case amounted to a retroactive law and violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution. (*See*, Vaughn's Motion for Rehearing, pp. 19-22). That motion was denied on February 5, 1992. (See Appendix C).

REASONS FOR GRANTING THE WRIT

Petitioners Had a Vested Right to Rely on the Defense of Limitations, and the Opinion of the Texas Supreme Court Operates Retrospectively to Deprive Petitioners of Their Vested Right, in Violation of the Due Process Clause of the Fourteenth Amendment.

Aduddell's cause of action for malpractice against the Petitioners accrued on April 24, 1985, when the limitations period on his underlying asbestosis claim was allowed to expire. Although Texas law recognizes the "discovery rule," under which the accrual of Aduddell's cause of action is delayed until he discovered or should have discovered it, the state courts in this case have consistently held that Aduddell waived reliance on that rule by failing to plead it in a timely fashion. Consequently, the limitations period for this malpractice action expired on April 24, 1987, or more than a year before the suit was actually filed.

Once limitations expired on the malpractice claim, the Petitioners acquired a vested right in that defense:

> [I]t is settled law that, after a cause of action has become barred by the statute of limitations, the defendant has a vested right to rely on such statute as a defense.

Wilson v. Work, 122 Tex. 545, 62 S.W.2d 490, 490 (1933).

It is well settled under Texas law that a court may not destroy a defense of limitations which has already vested. *McClung v. Johnson*, 620 S.W.2d 644, 648 (Tex. App.-Dallas 1987, writ ref'd, n.r.e.).

The Due Process Clause of the Fourteenth Amendment prohibits retrospective civil legislation when the consequences are harsh and oppressive. *U.S. Trust Co. of New York v. New Jersey*, 431 U.S. 1, 17, n.3 (1977). The consequences in this case are particularly harsh and oppressive because the retro-

active application to Petitioners of the Texas Supreme Court's decision in *Hughes v. Mahaney*, 35 Tex. S. Ct. J. 157 (November 23, 1991) effectively revived a previously barred liability for punitive damages.

Revival of a Previously Barred Cause of Action for Punitive Damages Violates the Due Process Clause of the Fourteenth Amendment.

Punitive damages are "quasi-criminal." *Pacific Mutual Life Ins. Co. v. Haslip*, ____ U.S. ____, 111 S. Ct. 1032, 1044 (1991). Consequently, the retroactive imposition of liability for punitive damages is analogous to the retroactive imposition of criminal liability. The latter is clearly prohibited under the Ex Post Facto Clause of Article I. *Cummings v. Missouri*, 4 Wall. 277, 322-326 (1867); *Calder v. Bull*, 3 Dall. 386, 390-91 (1798).

In determining whether "state law" violates the U.S. Constitution, no distinction is made between statutory law and court-made law. As this Court has stated:

> If a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a state supreme court is barred by the Due Process Clause from achieving precisely the same result by judicial construction.

Bouie v. City of Columbia, 378 U.S. 347, 353-54 (1963); *see also, Smith v. Cahoon*, 283 U.S. 553, 565 (1930) (court's construction of a statute is constitutionally suspect the same as if the legislature had written the court's language into the statute).

This Court has said many times that it would hesitate to approve the retrospective imposition of liability on any theory of deterrence or blameworthiness. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 17 (1975); *United States v. Peltier*, 422 U.S. 531, 542 (1975); *DeVeau v. Braisted*, 363 U.S. 144, 160

(1960). Yet, this is precisely the rationale for punitive damages under Texas law. *Ratner v. Sioux Natural Gas Corp.*, 719 F.2d 801 (5th Cir. 1983); *Cavnar v. Quality Control Parking, Inc.*, 696 S.W.2d 549 (Tex. 1985). The retroactive application of the common law rule announced in *Hughes* transgresses the constitutional limitation because it subjects the Petitioners to liability for punitive damages more than four and a half years after the Petitioners' defense had vested.

No state interest is advanced by retroactively subjecting Petitioners to liability for punitive damages after they had been free of all liability for a period in excess of four years. The Due Process Clause of the Fourteenth Amendment prohibits the retrospective imposition of quasi-criminal punishment. This petition for writ of certiorari should be granted so that Petitioners' previously vested rights are restored.

CONCLUSION

For the foregoing reasons, Petitioners pray that this Honorable Court grant the instant Petition for Writ of Certiorari and, upon review, reverse the decision of the Texas Supreme Court and affirm the judgments of the trial court and court of appeals.

Respectfully submitted,

CHARLES W. McGARRY

Counsel of Record

LAW OFFICE OF CHARLES McGARRY

714 Jackson Street
Suite 200
Dallas, Texas 75202
(214) 748-0800

Counsel for Respondents

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of this Petition for Writ of Certiorari was served on the 4th day of May, 1992 on each of the following persons pursuant to the terms of Supreme Court Rule 28.3, and that they constitute all the persons required to be served:

Mr. David Townend
Brown, Brown, Chandler
& Townend
1302 West Miller Road
Garland, Texas 75041

Mr. Gerald C. Conley
Jackson & Walker, L.L.P.
901 Main Street,
Suite 6000
Dallas, Texas 75202

Mr. David C. Cowden
Parkhill, Parkhill, Cowden
& Runge
2305 Oak Lane, Suite 121
Grand Prairie, Texas
75053

CHARLES W. McGARRY

APPENDIX

APPENDIX A

EDWIN I. ADUDDELL
vs.
WELDON PARKHILL ET AL.

No. D-0666

From Dallas County, Fifth District.-

Writ of error granted February 13, 1991. (34 Tex. Sup. Ct. Jour. 336.) (Opinion of the Court of Appeals is not reported, Rule 90, Texas Rules of Appellate Procedure.)

OPINION

On April 24, 1983, Edwin I. Aduddell (Aduddell) underwent a medical screening which resulted in a diagnosis of asbestosis. Thereafter, in mid-1983, Aduddell contacted Weldon Parkhill, an attorney with the law firm of Parkhill, Parkhill, Cowden & Runge, to make a claim against several asbestos manufacturers for his asbestos-related injuries. The firm, however, did not file the lawsuit in federal district court until May 20, 1985. A United States District Judge ultimately rendered judgment for the asbestos manufacturers on February 2, 1987, holding that Aduddell's suit was barred by the two year statute of limitations. Aduddell appealed that judgment to the Court of Appeals for the Fifth Circuit, which affirmed the trial court's judgment, and then to the United States Supreme Court, which denied writ of certiorari in February 1988.

Aduddell filed this malpractice suit against his former attorneys on June 22, 1988, alleging violations of the "laundry list" and breaches of express and implied warranties under the DTPA and for negligence. After the issues were joined, the defendants moved for summary judgment on the ground that the suit was barred by the two-year statutes of limitations

governing negligence and DTPA claims. Tex. Civ. Prac. & Rem. Code § 16.003(a); Tex. Bus. & Com. Code § 17.565. Aduddell filed a response to the motion and a third amended petition which pleaded the discovery rule, but the defendants successfully moved to strike Aduddell's third amended petition claiming it was untimely under Texas Rules of Civil Procedure 4 and 63, and Rule 1.9 of the Dallas Civil Court Rules. After a hearing, the trial court granted the defendants' motions for summary judgment.

The court of appeals affirmed the summary judgment, holding that when the plaintiff fails to timely plead the discovery rule, the legal injury rule applies in determining when a negligence cause of action accrues, and when the statute of limitations begins to run under section 16.003(a) of the Texas Civil Practice and Remedies Code. ____ S.W.2d at ____. The court of appeals held that Aduddell's legal injury in the malpractice case occurred on April 24, 1985, two years after he was diagnosed with asbestosis.

The defendants argue that Aduddell's malpractice cause of action accrued as early as April 24, 1985, the date that the statute of limitations ran on Aduddell's underlying cause of action. However, we express no opinion on this issue. Today, in *Hughes v. Mahaney*, ____ S.W.2d ____ (Tex. 1991), we announce a new rule tolling limitations until all appeals of the underlying claim are exhausted when an attorney allegedly commits malpractice while providing legal services in the prosecution or defense of a claim which results in litigation. Because that tolling provision also applies to the facts of this case, we reverse the judgment of the court of appeals and remand this cause to the trial court for further proceedings consistent with this opinion.

JOHN CORNYN
Justice

OPINION DELIVERED: November 20, 1991.

APPENDIX B

JAMES M. HUGHES ET AL.
vs.
MAHANEY AND HIGGINS ET AL.

No. D-0678

From Johnson County, Tenth District.

Writ of error granted March 6, 1991.(34 Tex. Sup. Ct. Jour. 397.) (Opinion of the Court of Appeals is not reported, Rule 90, Texas Rules of Appellate Procedure.)

OPINION

This case decides the proper application of the statute of limitations in a legal malpractice case when the attorney allegedly commits malpractice while providing legal services in the prosecution or defense of a claim which results in litigation. The trial court granted the attorneys' motion for summary judgment based on their affirmative defense of limitations, and the court of appeals affirmed. ____ S.W.2d ____. We hold that the statute of limitations was tolled until all appeals were exhausted on the underlying suit in which the malpractice allegedly occurred. Consequently, the statute of limitations did not bar the Hugheses' suit. Thus, we reverse the judgment of the court of appeals and remand the cause for trial.

In October 1982, James and Patti Hughes retained attorney Robert M. Mahaney to assist them with the adoption of a child. As planned, the day the child was born Mahaney obtained a signed affidavit of relinquishment of parental rights, irrevocable for 60 days, from the child's biological mother. However, the affidavit named Mahaney, rather than the Hugheses, temporary managing conservator of the child. The next day, Mahaney filed suit on behalf of the Hugheses to

terminate the biological mother's parental rights and for adoption of the child.

The biological mother, however, had a change of heart and revoked her affidavit of relinquishment on February 17, 1983, after the period of irrevocability expired. She then filed an application for writ of habeas corpus against Mahaney seeking possession of the child.[1] The Hugheses thereafter amended their pleadings to assert grounds for involuntary termination of the parent-child relationship, alleging: 1) that the biological parents left the child in possession of another with the express intention not to return; and 2) that the biological parents abandoned the child without providing adequate support for three months. Following an evidentiary hearing, the trial court denied the writ of habeas corpus and appointed the Hugheses temporary managing conservators of the child.

The biological parents then filed a motion to dismiss the Hugheses' suit on the ground that the Hugheses lacked standing under section 11.03(a) of the Texas Family Code to bring a suit affecting the parent-child relationship. Before the motion to dismiss was heard, and denied, and the termination of parental rights case was tried, Mahaney withdrew as the Hugheses' attorney because of the likelihood that he would be called to testify as a fact witness. Based on the jury's verdict, the trial court rendered judgment awarding the Hugheses custody and terminating the biological parents' rights.

The biological parents appealed, and on March 7, 1985, the Waco court of appeals reversed the trial court's judgment and ordered the trial court to dismiss the Hugheses' suit on the ground that they lacked standing to seek the termination of parental rights. In their subsequent malpractice action, the Hugheses alleged that the Waco court of appeals would have

[1]Shortly after filing the application for writ of habeas corpus, the biological mother married the biological father. He then joined her suit for possession of the child.

decided the standing issue in their favor had Mahaney named the Hugheses temporary managing conservators in the affidavit of relinquishment of parental rights rather than Mahaney. The Hugheses filed an application for writ of error in the termination of parental rights case, which we denied. We overruled their motion for rehearing on July 10, 1985.

The Hugheses then sued Mahaney, his partner and his law firm (hereinafter, collectively referred to as Mahaney) on May 21, 1987, alleging causes of action under the Texas Deceptive Trade Practices-Consumer Protection Act (DTPA)[2] and for negligence. In their first amended petition, they alleged that Mahaney: (1) violated the DTPA by warranting that he would obtain termination of the biological parents' rights during the sixty day period that the affidavit of relinquishment was irrevocable; (2) negligently named himself temporary managing conservator in the affidavit of relinquishment; and (3) negligently researched the law applicable to the adoption. They also alleged that Mahaney fraudulently concealed his failure to obtain an order terminating parental rights by telling the Hugheses that he had been unable to schedule a hearing due to the trial court's busy docket.

Mahaney filed a motion for summary judgment, asserting that the two-year statute of limitations barred the Hugheses' suit.[3] *See* Tex. Civ. Prac. & Rem. Code § 16.003(a). The trial court granted Mahaney's motion. The court of appeals affirmed the judgment, holding that the Hugheses' cause of action for Mahaney's alleged malpractice accrued when the Waco court of appeals issued its opinion on March 7, 1985 by operation of the discovery rule. ____ S.W.2d at ____. We need

[2]Tex. Bus. & Com. Code §§ 17.41-.63.

[3]The defendants also moved for summary judgment based upon the two-year statute of limitations under the DTPA. Tex. Bus. & Com. Code § 17.565. The Hugheses did not challenge the trial court's rendition of summary judgment on this cause of action.

not decide when the Hugheses' cause of action against Mahaney accrued, however, because regardless of the date it accrued we hold that the statute of limitations was tolled until all of the Hugheses' appeals in the termination action were exhausted.

A cause of action for legal malpractice accrues when the client sustains a legal injury or, in cases governed by the discovery rule, when the client discovers or should have discovered the facts establishing the elements of a cause of action.[4] *Smith v. McKinney*, 792 S.W.2d 740, 742 (Tex. App.-Houston [14th Dist.] 1990, writ denied) (the legal injury rule); *Willis v. Maverick*, 760 S.W.2d 642, 643 (Tex. 1988) (the discovery rule). However, when an attorney commits malpractice while providing legal services in the prosecution or defense of a claim which results in litigation, the legal injury and discovery rules can force the client into adopting inherently inconsistent litigation postures in the underlying case and in the malpractice case. This case demonstrates the untenability of that conflict.

Mahaney argues that the Hugheses' malpractice cause of action accrued as early as February 17, 1983, the date that the biological mother revoked her affidavit of relinquishment. If this date of accrual is correct, and we express no opinion on whether it is, the Hugheses would have had to file suit against Mahaney within two years of that date in order to preserve their malpractice cause of action. During that same interval, however, the Hugheses were appealing the Waco court of appeals' judgment, of necessity claiming that Mahaney's actions were not fatal to their claims. Specifically, had the

[4]Although section 16.003(a) of the Texas Civil Practice and Remedies Code states that a suit must be brought within two years after a cause of action accrues, it is a judicial function "to determine when a cause of action accrues and thus when the statute of limitations commences." *Willis v. Maverick*, 760 S.W.2d 642, 644 (Tex. 1988).

Hugheses sued Mahaney for malpractice while seeking to overturn the Waco court of appeals decision, they would have been placed in the position of claiming that Mahaney committed malpractice in the handling of their termination of parental rights suit and that, but for Mahaney's negligence, the termination of parental rights and subsequent adoption would have succeeded. In pursuing their appeal of the underlying claim, however, the Hugheses had to make the inconsistent claim that Mahaney's actions were correct, or, at least not fatal to their claims. As a result of this conflict, the likelihood of their success in both suits would have been compromised.

Where "a person is prevented from exercising his legal remedy by the pendency of legal proceedings, the time during which he is thus prevented should not be counted against him in determining whether limitations have barred his right." *Walker v. Hanes*, 570 S.W.2d 534, 540 (Tex. Civ. App.-Corpus Christi 1978, writ ref'd n.r.e.) (limitations tolled while prior submission of same case was being appealed); *Cavitt v. Amsler*, 242 S.W. 246, 249 (Tex. Civ. App.-Austin 1922, writ dism'd) (limitations on suit for dividends tolled while suit to determine ownership of stock was being appealed); *Pease v. State*, 228 S.W. 269, 270-71 (Tex. Civ. App.-El Paso 1921, writ ref'd) (plaintiff's cause of action in suit for salary did not accrue until final decision in quo warranto proceeding that defendant was not entitled to job); *Fields v. Austin*, 30 S.W. 386, 387 (Tex. Civ. App. 1895, writ ref'd) (cause of action for rent did not accrue until appeals exhausted on suit to determine title to land).

We conclude that the rationale applied in these cases is also appropriate when a client's cause of action for malpractice arises during the attorney's prosecution or defense of a claim which results in litigation. Limitations are tolled for the second cause of action because the viability of the second cause of action depends on the outcome of the first.

Therefore, we hold that when an attorney commits malpractice in the prosecution or defense of a claim that results in litigation, the statute of limitations on the malpractice claim against the attorney is tolled until all appeals on the underlying claim are exhausted. We join other jurisdictions in adopting this well-reasoned rule.[5]

Here, since the statute of limitations was tolled from the time the Hugheses' cause of action accrued until July 10, 1985, when we overruled the Hugheses' motion for rehearing on their application for writ of error in the termination of parental rights suit,[6] the lawsuit that the Hugheses filed against

---

[5]*See Bonanno v. Potthoff*, 527 F. Supp. 561, 565 (N.D. Ill. 1981) (applying Illinois law); *Amfac Dist. Corp. v. Miller*, 138 Ariz. 152, 673 P.2d 792, 793 (1983); *Peat, Marwick, Mitchell & Co. v. Lane*, 565 So. 2d 1323, 1326 (Fla. 1990); *Neylan v. Moser*, 400 N.W.2d 538, 542 (Iowa 1987); *Semenza v. Nevada Medical Liability Ins. Co.*, 765 P.2d 184, 186 (Nev. 1988). These cases turn on other policy considerations unnecessary to our decision today. *See, e.g., Amfac Dist. Corp. v. Miller*, 673 P.2d 795, 797 (Ariz. Ct. App. 1983), *aff'd as supplemented*, 138 Ariz. 152, 673 P.2d 792, 793 (1983).

However, other jurisdictions have rejected the "exhaustion of appeals" rule. These courts hold that the statute of limitations runs from the time the cause of action accrues although they acknowledge the possibility that the underlying case may be reversed on appeal and that, as a result, the amount of the client's damages is speculative. They decline to toll the statute of limitations until damages have been fully ascertained. *See Wettanen v. Cowper*, 749 P.2d 362, 365 (Alaska 1988); *Zupan v. Berman*, 142 Ill. App. 3d 346, 491 N.E.2d 1349, 1351 (1986); *Sabes & Richman, Inc. v. Muenzer*, 431 N.W.2d 916, 918-19 (Minn Ct. App. 1988); *Dixon v. Shafton*, 649 S.W.2d 435, 438 (Mo. 1983); *Suzuki v. Holthaus*, 221 Neb. 72, 375 N.W.2d 126, 128 (1985); *Zimmie v. Calfee, Halter & Griswold*, 43 Ohio St. 3d 54, 538 N.E.2d 398, 402 (1989); *Chambers v. Dillow*, 713 S.W.2d 896, 898 (Tenn. 1986); *Richardson v. Denend*, 795 P.2d 1192, 1195 n.7 (Wash. Ct. App. 1990). Still other courts reject "exhaustion of appeals" because of their overriding concern with the prejudice caused by delay as the underlying case works its way through the appellate process. *Laird v. Blacker*, 229 Cal. App. 3d 159, 229 Cal. Rptr. 700, 711 (1991); *Hennekens v. Hoerl*, 460 Wis. 2d 144, 465 N.W.2d 812, 818 (1991). Because we base our decision today on a different and more fundamental policy consideration, we do not address the policy considerations advanced by other jurisdictions.

[6]We hold that the tolling of the statute of limitations on the Hugheses mal-

Mahaney on May 21, 1987, is not barred by the two year statute of limitations Tex. Civ. Prac. & Rem. Code § 16.003(a). Therefore, the trial court erred when it granted Mahaney's motion for summary judgment on the defense of limitations.

For the foregoing reasons, we reverse the judgment of the court of appeals and remand this cause to the trial court for further proceedings consistent with this opinion.

JOHN CORNYN
Justice

OPINION DELIVERED: November 20, 1991.

---

practice case ended when we overruled the Hugheses' motion for rehearing because the last action of right that they could take and did take on the underlying case was concluded on that date.

APPENDIX C

THE SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

February 5, 1992

Mr. David W. Townend
Brown, Brown, Chandler & Townend
P.O. Box 472286
Garland, TX 75047

Mr. David C. Cowden
Parkhill, Parkhill, Cowden & Runge
P.O. Box 530709
2305 Oak Lane, Suite #121
Grand Prairie, TX 75053

Mr. Alan N. Greenspan
Jackson & Walker
901 Main Street
Suite 6000
Dallas, TX 75202

Mr. H. Grady Chandler
Brown, Brown, Chandler & Townend
P.O. Box 472286
Garland, TX 75047

Mr. Gerald C. Conley
Jackson & Walker, L.L.P.
901 Main Street, Suite 6000
Dallas, TX 75202

Ms. Sylvia D. Wells
Jackson & Walker, L.L.P.
901 Main Street, Suite 6000
Dallas, TX 75202

RE: Case No. D-0666

Style: EDWIN I. ADUDDELL
v. WELDON PARKHILL, HENRY B. PARKHILL, DAVID C. COWDEN ET AL.

Dear Counsel:

Today, the Supreme Court of Texas overruled both motions for rehearing in the above-referenced cause. Motion for rehearing of cause filed on behalf of John Vaughan, is overruled, as corrected.

Sincerely,

John T. Adams, Clerk

by _____
Blanca Morin, Deputy

(2)

No. 91-1790

Supreme Court, U.S.
FILED
JUN 2 1992
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1991

WELDON PARKHILL, HENRY B. PARKHILL, DAVID C. COWDEN, JOHN B. RUNGE, INDIVIDUALLY and d/b/a PARKHILL, COWDEN & RUNGE, A General Partnership, JOHN VAUGHAN, PARKHILL, PARKHILL, COWDEN & RUNGE, A Professional Corporation and PARKHILL & PARKHILL, A General Partnership,

Petitioners,

vs.

EDWIN I. ADUDDELL,

Respondent.

Petition For Writ Of Certiorari To The Texas Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DAVID W. TOWNEND
Counsel of Record

BROWN, BROWN, CHANDLER & TOWNEND
P. O. Box 472286
Garland, Texas 75047-2286
214/271-4561
214/278-3588 (Fax)

Attorneys for Respondent Edwin I. Aduddell

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW RESTATED

Does the retroactive application of a state supreme court decision violate the due process clause of the Fourteenth Amendment, when the decision vitiates a previously vested statute of limitations defense, and revives a defendant's liability for punitive damages?

Is the due process clause of the Fourteenth Amendment violated when a defendant is retroactively subjected to liability for punitive damages?

REPLY: This Court lacks jurisdiction to review and issue an advisory opinion in this case since there is no final judgment awarding any damages; the questions involve purely a matter of state procedural law; Petitioners have failed to properly present these points in the state courts and have waived them; and this case does not involve the retroactive application of a statute of limitation defense destroying vested rights, but rather the application of a century old principle of tolling of statute of limitations.

TABLE OF CONTENTS

Page

Questions Presented for Review Restated i

Table of Contents ii

Table of Authorities iii

Opinions Below 1

Jurisdiction 2

Constitutional Provisions 2

Statement of the Case 2

Reasons for Denying the Writ 4

Conclusion 9

TABLE OF AUTHORITIES

Page(s)

CASES

Anonymous Numbers 6 and 7 v. Baker, 360 U.S. 287, 3 L.Ed.2d 1234, 79 S. Ct. 1157 (1959)..... 4

Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71, 108 S. Ct. 1645, 100 L.Ed.2d 62 (1988).....5, 8

Browning-Ferris Industries, Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 106 L.Ed.2d 219, 109 S. Ct. 2909 (1989).....5, 8

Bruce v. Tobin, S.D. 245 U.S. 18, 38 S. Ct. 7 (1917)..... 4

Caldwell v. Mississippi, 472 U.S. 320 (1985)..... 5

Fuller v. Oregon, 417 U.S. 40, 94 S. Ct. 2116, 40 L.Ed.2d 642 (1974)..... 5

Henry v. Mississippi, 379 U.S. 443 (1965)..... 5

Michigan v. Tyler, 436 U.S. 499, 98 S. Ct. 1942, 56 L.Ed.2d 486 (1978)..... 4

Monks v. N.J., 398 U.S. 71, 90 S. Ct. 1563, 26 L.Ed.2d 54 (1970)..... 4

Murdock v. Memphis, 87 U.S. 590 (1875)..... 5

O'Dell v. Espinoza, 456 U.S. 430, 102 S. Ct. 1865, 72 L.Ed.2d 237 (1982)..... 4

Pacific Mutual Life Insurance Co. v. Haslip, ___ U.S. ___, 111 S. Ct. 1032 (1991)..... 9

Pickering v. Board of Education of Township H.S. District No. 205 Will County, Illinois, 391 U.S. 563, 88 S. Ct. 1731, 20 L.Ed.2d 811 (1968).....4, 5

Rescue Army v. Municipal Court, 331 U.S. 549 (1947)..... 5

TABLE OF AUTHORITIES – Continued

Page(s)

Zacchini v. Scripps Howard Broadcasting Co., 433 U.S. 562, 97 S. Ct. 247 (1977) 4, 8

Kimball v. Florida Bar, 465 F. Supp. 925 (D.C. Fla. 1979) aff'd 632 F.2d 1283 4

Aduddell v. Parkhill, 821 S.W.2d 158 (Tex. 1991) 5

Bender v. Crawford, 33 Tex. 745 (1870) 6

Borderlon v. Peck, 661 S.W.2d 907 (Tex. 1983) 7

Dallas v. Etheridge, 253 S.W.2d 640 (Tex. 1952) 6

Hughes v. Mahaney, 821 S.W.2d 154 (Tex. 1991) ... 1, 3, 5

Maloney v. Roberts, 32 Tex. 136 (Tex. 1869) 6

Mellanger v. Mayor of Houston, 3 S.W. 249 (Tex. 1887) 7

Wilson v. Work, 62 S.W.2d 490 (Tex. 1933) 7

Amarillo Independent School District v. Brockmeyer, 292 S.W.2d 886 (Tex. App. – Amarillo 1956) 6

Crawford v. Adams, 213 S.W.2d 721 (Tex. App. 1948, writ ref'd n.r.e.) 6

Deitz v. Vaughn, 423 S.W.2d 113 (Tex. App. – Waco 1967) aff'd 430 S.W.2d 47 6

Fields v. Austin, 30 S.W. 386 (Tex. App. 1885, writ ref'd) 6

McClung v. Johnson, 620 S.W.2d 644 (Tex. App. – Dallas, writ ref'd n.r.e.) 7

TABLE OF AUTHORITIES – Continued

Page(s)

Sowders v. M. W. Kellogg Co., 663 S.W.2d 644 (Tex. App. – Houston 1983, writ ref'd n.r.e.) 6

Travis County v. Matthews, 235 S.W.2d 691 (Tex. App. 1950, writ ref'd n.r.e.) 6

Twyman v. Twyman, 790 S.W.2d 819 (Tex. App. – Austin 1990) writ granted 34 Tex. Sup. Ct. J. 173 7

Walker v. Haras, 570 S.W.2d 534 (Tex. App. – Corpus Christi 1978, writ ref'd n.r.e.) 6

STATUTES, RULES, ETC.

Tex. Bus. Com. Code § 17.41 3

12 *Tex. Jur. III*, "Constitutional Law," § 181 nn 95-96, § 185 ..... 7, 8, 9

50 *Tex. Jur. III*, "Limitation of Actions," § 119-123 6

50 *Tex. Jur. III*, "Limitation of Actions," § 164, pp. 633-635 6

28 U.S.C.A. § 1257(3) 2

No. 91-1790

In The

Supreme Court of the United States

October Term, 1991

WELDON PARKHILL, HENRY B. PARKHILL, DAVID C. COWDEN, JOHN B. RUNGE, INDIVIDUALLY and d/b/a PARKHILL, COWDEN & RUNGE, A general Partnership, JOHN VAUGHAN, PARKHILL, PARKHILL, COWDEN & RUNGE, A Professional Corporation and PARKHILL & PARKHILL, A General Partnership,

Petitioners,

vs.

EDWIN I. ADUDDELL,

Respondent.

Petition For Writ Of Certiorari To The Texas Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

Respondent disagrees that *Hughes v. Mahaney,* 35 S. Ct. J. 157 (Tex. 1991) (*see Appendix B* to Petition for Writ of Certiorari) adopted a new rule of law, but rather applied a century old principle of tolling of limitations in legal malpractice actions.

JURISDICTION

With respect, this Court lacks jurisdiction under 28 U.S.C.A. § 1257(3). Although the form of the Petition claims infringement of constitutional rights, the substance of this case involves a nonfinal judgment wherein the Texas Supreme Court applied a principle of tolling, rooted in the jurisprudence of Texas for over a century, to a statute of limitations defense in legal malpractice actions. This is purely a matter of state procedural law and does not present a federal question. Petitioners waived any constitutional claims since they were not timely presented to the state courts of Texas, there is no final judgment awarding any damages as the case merely reversed and remanded the granting of a summary judgment, and this Court cannot render an advisory opinion.

CONSTITUTIONAL PROVISIONS INVOLVED

Respondent understands Petitioners are invoking the due process clause of the 14th Amendment to the United States Constitution, but Respondent strenuously disagrees that any constitutional questions are applicable in the instant case. (*See* jurisdictional arguments above.)

STATEMENT OF THE CASE

There are many factual inaccuracies in Petitioners' summary of the statement of the case. For example, in addition to filing a lawsuit against his attorneys for negligently failing to timely file the asbestosis claim which

resulted in it being barred by the statute of limitations, Respondent alleged many other causes of action based on their errors in mishandling his case based upon negligence, gross negligence, breach of warranty and the Texas Deceptive Trade Practices Act, § 17.41 *et seq.* for Tex. Bus. & Com. Code. The trial court did not rule that Respondent had waived the discovery rule, but merely granted a summary judgment based upon one or more of the grounds raised in the Petitioners' motion. To the contrary, Respondent had asserted the discovery rule in a lengthy response which was filed. Respondent also takes issue with the notion that the Supreme Court adopted a "new rule tolling limitations" when it decided *Hughes v. Mahaney, supra*, which relied upon case law embedded in Texas law for over a century under which the statute of limitations is tolled pending legal proceedings. The Texas Supreme Court merely extended a well settled tolling principle to legal malpractice actions so that where a legal malpractice lawsuit arises out of the handling or mishandling of litigation, limitations will be tolled during the pendency of that lawsuit. Respondent would also point out that Petitioners first raised constitutional grounds in a motion for rehearing filed in the Texas Supreme Court, and have failed to properly present these issues to the Texas courts and have therefore waived them.

REASONS FOR DENYING THE WRIT

THIS COURT LACKS JURISDICTION TO REVIEW A NON-FINAL JUDGMENT WHERE THE CONSTITUTIONAL QUESTION HAS NOT BEEN ADDRESSED BY THE COURT OF LAST RESORT.

This Honorable Court cannot render advisory opinions, *Zacchini v. Scripps Howard Broadcasting Co.*, 433 U.S. 562, 97 S. Ct. 247 (1977), nor review the constitutionality of a state law that has not been addressed by the state court of last resort. *Anonymous Numbers 6 and 7 v. Baker*, 360 U.S. 287, 3 L.Ed.2d 1234, 79 S. Ct. 1157 (1959); *Accord, Kimball v. Florida Bar*, 465 F. Supp. 925 (D.C. Fla. 1979) aff'd 632 F.2d 1283. The Texas Supreme Court merely remanded for new trial, there has been no award and this is not a reviewable final judgment. *Bruce v. Tobin*, S.D. 245 U.S. 18, 38 S. Ct. 7 (1917); *O'Dell v. Espinoza*, 456 U.S. 430, 102 S. Ct. 1865, 72 L.Ed.2d 237 (1982).

PETITIONERS FAILED TO PRESENT THE FEDERAL QUESTIONS IN CONFORMANCE WITH STATE PROCEDURES AND HAVE WAIVED THE POINTS.

Petitioners first raised the constitutional points in the Texas Supreme Court in a motion for rehearing. Although the Texas Supreme Court denied the petition for rehearing, the Texas courts have not had an opportunity to address this nonmeritorious point. A failure to present a federal question in conformance with state procedures justifies a denial of the writ. *Michigan v. Tyler*, 436 U.S. 499, 98 S. Ct. 1942, 56 L.Ed.2d 486 (1978). This Court properly denies a writ where the state court has had no opportunity to pass upon the questions. *Monk v. N.J.*, 90 S. Ct. 1563, 398 U.S. 71, 26 L.Ed.2d 54 (1970); *Pickering v.*

Board of Education of Township H.S. District No. 205 Will County, Illinois, 391 U.S. 563, 88 S. Ct. 1731, 20 L.Ed.2d 811 (1968). (A constitutional claim of due process raised for the first time in the Supreme Court is too late.) *Fuller v. Oregon,* 417 U.S. 40, 94 S. Ct. 2116, 40 L.Ed.2d 642 (1974).

This Court has rejected a due process challenge to a punitive damage claim which was not, as in the instant case, raised either in the trial court or in the Court of Appeals. *Browning-Ferris Industries, Inc. v. Kelco Disposal, Inc.,* 492 U.S. 257, 106 L.Ed.2d 219, 109 S. Ct. 2909 (1989); *accord, Bankers Life & Casualty Co. v. Crenshaw,* 486 U.S. 71, 108 S. Ct. 1645, 100 L.Ed.2d 62 (1988).

THIS COURT WILL NOT REVIEW A STATE COURT DECISION RESTING ON ADEQUATE AND INDEPENDENT STATE PROCEDURAL GROUNDS THAT DOES NOT INFRINGE UPON CONSTITUTIONAL RIGHTS.

This Court will not review a state court decision resting on adequate and independent state grounds, *Murdock v. Memphis,* 87 U.S. 590 (1875); *Caldwell v. Mississippi,* 472 U.S. 320 (1985); and has no jurisdiction to review a state court's interpretation of state law so long as it does not intrude upon federal law. *Rescue Army v. Municipal Court,* 331 U.S. 549 (1947). Nor will this Court review state procedural questions that do not infringe upon constitutional rights. *Henry v. Mississippi,* 379 U.S. 443 (1965). The instant case does not involve any constitutional questions, but merely an interpretation of state procedural law. The rule of law announced by the Texas Supreme Court, involves the application of well settled tolling principles to the limitations defenses in malpractice actions. In *Hughes v. Mahaney* and in *Aduddell v. Parkhill,*

the Texas Supreme Court cited century old case law, *Fields v. Austin*, 30 S.W. 386 (Tex. App. 1885, writ ref'd) and *Walker v. Haras*, 570 S.W.2d 534 (Tex. App. – Corpus Christi 1978, writ ref'd n.r.e.).

Statutes of limitations have reference to the remedy and do not confer a vested right. *Travis County v. Matthews*, 235 S.W.2d 691 (Tex. App. 1950, writ ref'd n.r.e.); *Amarillo Independent School District v. Brockmeyer*, 292 S.W.2d 886 (Tex. App. – Amarillo 1956); *Dallas v. Etheridge*, 253 S.W.2d 640 (Tex. 1952); *Sowders v. M. W. Kellogg Co.*, 663 S.W.2d 644 (Tex. App. – Houston 1983, writ ref'd n.r.e.). That a statute of limitation defense may not be available does not raise constitutional questions. For example, a statute of limitation defense may be waived if not raised. *See* 50 *Tex. Jur. III*, "Limitation of Actions," § 164, pp. 633-635. Legislation that suspends limitations have been upheld against various constitutional attacks, including ex post facto effect. *See Bender v. Crawford*, 33 Tex. 745 (1870). Limitations were successfully suspended during time of war, *Maloney v. Roberts*, 32 Tex. 136 (Tex. 1869), and a federal statute tolling limitations during periods of military service have been upheld. *Crawford v. Adams*, 213 S.W.2d 721 (Tex. App. 1948, writ ref'd n.r.e.) There are legislative tolling provisions which have been upheld including a statute tolling limitations against a person while outside the state, *Deitz v. Vaughn*, 423 S.W.2d 113 (Tex. App. – Waco 1967) aff'd 430 S.W.2d 47; and statutes tolling limitations during a period of disability of incapacity, for persons while serving in the armed forces or during a period of minority. *See* 50 *Tex. Jur. III*, "Limitations of Actions," §§ 119-123. The courts have also recognized nonstatutory tolling provisions such

as fraudulent concealment, *Borderlon v. Peck*, 661 S.W.2d 907 (Tex. 1983) and the concept of a continuing tort. *Twyman v. Twyman*, 790 S.W.2d 819 (Tex. App. – Austin 1990) writ granted 34 Tex. Sup. Ct. J. 173.

There are some Texas cases that hold the legislature may not enact laws to apply retroactively to impair vested rights. In *Mellanger v. Mayor of Houston*, 3 S.W. 249 (Tex. 1887), the court held the legislature could not enact new legislation to allow the collection of taxes after the limitation period had run. *Wilson v. Work*, 62 S.W.2d 490 (Tex. 1933), held that new legislation could not be applied retroactively to destroy a vested right. These cases are inapplicable for the instant case does not involve the application of legislation retroactively to revive a claim barred by existing law. This case involves the application of a well settled judicial tolling rule of law. Petitioners have no vested right in the non-application of a tolling principle to a statute of limitation defense that had been embedded in Texas law for nearly a century. Limitations pertain to the remedy that may be affected and not to substantive rights, and a change in a statute of limitation applicable to a cause of action that is not barred is not within the constitutional prohibition against retroactive statutes. 12 *Tex. Jur. III*, "Constitutional Law," § 181 nn 95-96, § 185. Petitioners cite *McClung v. Johnson*, 620 S.W.2d 644 (Tex. App. – Dallas, writ ref'd n.r.e.), however, that case involved the retroactive application of legislation which purported to revive a cause of action otherwise barred by the statute of limitations. There has been no legislative impairment of a vested right in the instant case.

PUNITIVE DAMAGES QUESTIONS WERE NOT PROPERLY PRESENTED TO THE STATE COURTS AND WERE WAIVED OR ARE PREMATURE AS THERE HAS BEEN NO AWARD.

This Honorable Court has rejected constitutional challenges to punitive damage awards which were not raised, as here, in the trial court or the Court of Appeals, *Browning-Ferris Industries, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 106 L.Ed.2d 219, 109 S. Ct. 2909 (1989). Nor will this Court review constitutional challenges to punitive damage claims which were not properly presented or passed upon by the state's highest court. *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 100 L.Ed.2d 62, 108 S. Ct. 1645 (1988). In the instant case, none of the Texas courts passed upon the constitutional challenge to the punitive damage question since it was not presented in the trial court, Court of Appeals or to the Supreme Court until raised in a motion for rehearing. Further, there has been no trial of the case, merely a reverse and remand for a new trial. There may or may not be an award of punitive damages in this case, and for this Court to grant the Petition for Writ of Certiorari and review the punitive damage question where there has been no award would be to render an advisory opinion. *Zacchini v. Scripps Howard Broadcasting Co.*, 433 U.S. 562, 97 S. Ct. 2847 (1977).

This is not the retroactive application of law which revives a punitive damage claim, but rather the application of well settled tolling principle to a statute of limitation defense. Since the statute of limitation affects the remedy and not substantive rights, there is no substantial federal question raised. 12 *Tex. Jur. III*, "Constitutional

Law," § 181 nn 95-96, § 185. Although this Court did review the constitutionality of punitive damages under the due process clause in *Pacific Mutual Life Insurance Co. v. Haslip*, ___ U.S. ___, 111 S. Ct. 1032 (1991), there was a trial and an award of actual and exemplary damages and constitutional challenges to the award of punitive damages were asserted in the state courts in accordance with state court procedure. These questions are premature. There is no slate for this Court to write upon and Petitioners have no vested rights in having the Texas Supreme Court ignore 100 years of case law.

CONCLUSION

The Petition for Writ of Certiorari should be denied. There are no constitutional questions presented and the state court decision rests on adequate and independent state procedural grounds. There is no final judgment nor award of actual damages or exemplary damages and this Court cannot render an advisory opinion as to constitutional claims which have not properly been presented to the state court.

Respectfully submitted,

DAVID W. TOWNEND
BROWN, BROWN, CHANDLER & TOWNEND
State Bar No. 20155700
P. O. Box 472286
Garland, Texas 75047
214/271-4561
214/278-3588 (Fax)

Attorneys for Respondent